COMMUNIQUÉ

Newsletter of the
New Zealand Architects Co-operative Society Ltd
April 2005

Editorial

By Alan Purdie – Editor

Alan writes:

Alan was the Secretary of the ***NZIA*** at the time ***NZACS*** was founded and become the first Secretary of ***NZACS*** on its formation. As ***NZACS*** commences its 33rd year of business it is timely to reflect on the purpose for which the ***NZACS*** was formed and what it has achieved since it was formed in 1972.

At the end of the 2004 insurance year ***NZACS*** had 671 insured members, a 40% increase over that of ten years previously. Many who will have joined in this time and earlier may not be aware of the background to the formation of ***NZACS.***

In the late 1960s following the Freeman's Bridge collapse in Melbourne, Professional Indemnity Insurance premiums world wide escalated enormously including those in New Zealand. It was a global market and we were linked into that. As a consequence the ***NZIA*** took the view it needed to take positive steps in an endeavour to better manage Professional Indemnity Insurance and its cost for architects.

This resulted in the formation of the New Zealand Architects Co-operative Society Ltd under the provisions of the Industrial and Provident Societies Act 1908. It is important to emphasis that it was a deliberate decision to make the organisation a co-operative rather than a company. This meant that all profits were retained within ***NZACS*** for the benefit of all members both then and in the future and not taken out by way of dividend for shareholders or a major shareholder which at that time could have been ***NZIA.***

Being a co-operative is the fundamental philosophy of ***NZACS.*** By banding together to create a substantial group of practices the profession through ***NZACS,*** would be in a better position in the future to exercise a measure of control over Professional Indemnity Insurance policy terms and premiums. This kind of negotiation is not an option available to most individual firms, the majority of whom are quite small generating only modest fee incomes.

A further benefit envisaged was to create the opportunity for architect directors to become involved in assisting in the managing of claims on behalf of members. In other words providing mutual support by colleagues who understand the profession, the industry and issues confronted by architects when designing and building buildings. Over the years our Claims Directors have gained considerable experience in this area and have provided, and continue to provide outstanding service and advice to members.

One of the problems the directors face in managing ***NZACS*** is how to grow the membership and build its asset base. The New Zealand profession is quite small with around 1580 active architects and say 630 plus practices. So how then does ***NZACS*** grow, and at the same time diversify its risk profile?

A number of years ago the Directors agreed to admit as full members B Arch graduates who were operating their own practices and more recently the Directors offered full membership to members of Architectural Designers of New Zealand (ADNZ). In addition to this through its wholely owned subsidiary, Acanthus Insurance Co. Ltd, it underwrote a proportion of the risks of other professions – Engineers, Accountants, Lawyers and Landscape Architects to mention a few.

There has been some comment about this decision indicating ***NZACS*** was not being loyal to architects. That is definitely not the case. It was a deliberate business decision which benefited all by building income strengthening the balance sheet and therefore its negotiating power with underwriters in the future.

With the Registered Building Practitioner regime coming into force by November 2009 it is expected ADNZ membership could increase and so will the demand for Professional Indemnity Insurance. ***NZACS*** is in a position to meet that demand.

As members know ***NZACS*** suffered a considerable financial set back in 1998/1999 years as a result of a number of large claims mainly from within the architectural profession. This financial set back is gradually being overcome year by year with careful governance and management. The expansion of our membership base also assists in this recovery process.

NZACS is now far more financially secure than at the end of 1999 and has only a short distance to go to complete the Director's full recovery plan. The continued loyalty of our membership is the key to this recovery and your Directors want to record their appreciation to you all for your ongoing support. That continuing support is vital.

Remember it is a co-operative -YOUR CO-OPERATIVE.

Companion Liability Covers

Following the annual renewals in November last it has been pleasing to note there had been a 22% increase in member firms taking the companion liability covers. There are four such covers offered, these being: Statutory Liability, Employers Liability, Employment Practices Liability, and General (Public) Liability.

Statutory Liability cover could prove to be an important cover to hold as the Building Act 2004 kicks in. Under the legislation there are some quite heavy fines proposed for breaches of these Acts and this statutory liability cover will met those fines should they be unfortunately incurred.

So keep these covers in mind when next you complete your proposal for renewal.

Non Renewal – What Does That Mean

Non renewal of your Professional Indemnity Insurance means, quite simply, you don't have cover until you renew. That can be serious. It means that when you do renew there is going to be a gap in your cover and work undertaken in that period will not be insured. So in future don't be one of those members who renews late.

NZACS Has A Web Site

This is a reminder to all members that ***NZACS*** does have a web site so just click on to www.nzacs.co.nz Once on the web site all you have to do is use your account number AC….. to log on.

Many of the Communiqué articles are available there listed in various categories of practice, as well as general information regarding the Society, Professional Indemnity Insurance, and links to other services.

Non Standard Terms Of Consultant Agreements

For those members with long memories many may remember the singing trio of Peter, Paul and Mary. They had a song which finished "*when will they ever learn, when will they ever learn."*

Well these are the words your claims directors are muttering, not so musically however, regarding some members who don't appear to have learnt you don't blindly sign non-standard conditions of engagement. What is required is a very close scrutiny of the fine print to ascertain whether there are any of those nasty words included which significantly increase liability, and if so, should be struck out.

To emphasis the point the directors have asked that the August 2001 article, written by Chairman Barry Dacombe, be republished as a very strong reminder to all members.

In the article Barry deals with deeds of covenant and warranties which continue to be commonplace in non-standard consultant agreements.

Seemingly Innocent Words

It is often difficult to identify what is "non-standard" in terms of the content of client or project management generated conditions of engagement.

Just a few words slipped in here and there can make a significant difference to the extent of additional liability you take on.

For example:

"The architect shall perform the services to the "best" or the "highest" standards of professional performance." "The Architect will "ensure" that the Contractor…" "The Architect will carry out "detailed inspections" of the work …" "The Architect will "supervise" the work".

Best or Highest implies that there is no better standard. At Common Law you are only required to perform your services with reasonable care, skill and diligence.

Ensure (assure) means that you will make certain that …. This is an express performance warranty or guarantee that may not be in your power or authority to achieve.

Detailed Inspections and just Inspections means that you are contracting to provide a detailed examination of some aspect of the building that you are not normally paid to do or perhaps don't have the necessary skill or knowledge to perform to the extent that is expressed or implied.

Use the term Observation and then only to the extent that you may describe – refer to AAS2.

Supervise implies that you will stand over and direct the Contractor in every aspect of the performance of the clause construction contract.

The best way of identifying words that have been slipped in is to compare these clauses with the equivalent ones in AAS2 or ask yourself the question:

"Does this clause require me to contract for a service, risk or liability beyond those as expressed in AAS2?"

Your diligence in ensuring that such words are not included in your agreement could well save you a good deal of strife at a later date.

Superlatives

At all times check your own description of the scope and extent of service that you will be providing for adjectives that are superlative.

By removing them you will describe a more precise meaning of what it is you will do without extending your liability to do something for which you are not paid.

Avoid statements like preparing "complete drawings" that you can not possibly do - achieving a "most economical" result - producing something of the "highest quality" "guarantee" or "warrant" an outcome and so on.

Indemnities

Be very careful of indemnities and avoid accepting conditions that require you to indemnify, defend and hold harmless your client for anything that may happen in this world and the next under your contract.

These are very dangerous and onerous obligations that can extend your contractual liability far beyond your normal duty of care at Common Law for the consequences of any act, error or omission on your part.

The inclusion of an indemnity or hold harmless clause has substantive and procedural implications for the conduct of the legal defence of any claim made against you.

The substantive implications are that your liability may be extended beyond the scope of an Architect's liability at Common Law in contract or tort.

The procedural implications are that your client may be entitled to apply for summary judgment on liability or even perhaps quantum that confers on the client an enormous bargaining advantage.

Such an advantage a client would not normally have when faced with normal court proceedings. There are occasions when your client may insist on such clauses.

Where these are totally unavoidable you need to make sure that the indemnity you give relates to the service or part of the service of which you are in full control.

You need to ensure that the words in the clauses that follow on from any indemnity are, as far as is practicable, coextensive with your common law liability. This requires appropriate legal advice.

For example, you may be required to defend your client and even pay for the client's legal expenses if the loss arises from your negligence or failure to perform. This can include, in some extreme cases. Even paying for the solicitor/client costs in suing you.

A not too uncommon clause, as an example, of what not to agree to is:

"The Architect will indemnify and hold harmless the Client from all claims arising from the architect's performance or service on the project."

Such a wording is a definite attempt at defeating your normal legal defences against any claim for damages resulting from professional negligence.

The dangerous words here are:

"indemnify and hold harmless"

"arising from"

There are also words omitted that are needed to align such a clause with your Common Law liability.

A wording that preferably should appear would be:

"The Architect shall be liable to the Client for any reasonably foreseeable claims to the extent caused by any negligent act error or omission in the performance of the services by the Architect".

When asked to accept such clauses, counter your agreement by linking the clause to the limitation of your responsibilities and liability as listed in AAS2.

By this means you are at least limiting your exposure to liability in specific aspects of your service and the possible outcomes from it.

Warranties & Guarantees

Your Professional Indemnity Insurance does not extend to include coverage for the granting of performance guarantees or warranties to Clients or other parties that would not have otherwise applied to you at Common Law.

Many non-standard agreements contain Deeds of Covenant and Deeds of Warranty appended to the contract for services.

Be very wary of such Deeds as they often do not limit your duty of care or your liability in any way to at least be coexistent with the terms and conditions of your original commission.

It is often a good argument to remind the client that such Clauses may, if incorporated in the agreement for service, remove the very financial protection of the insurance the Client is seeking from you (in other words you may compromise the very insurance protection your Client has asked you to provide).

Remember a "warranty" or a "guarantee" when incorporated in such a Deed links you directly with the Client or perhaps with other parties.

This is in respect of your obligation to perform a specific service and sheets home the liability to you should the performance or non-performance of the service result in any loss or harm to the Client.

Accordingly the wording of such Deeds has to be carefully tailored to reflect the nature of the professional service you are providing and incorporate some suitable limitations to your liability should you be negligent in providing it.

Seek Advice

In all cases seek the advice of your lawyer when faced with conditions of engagement that you consider may represent a potential threat to you in the performance of your contract.

Your Client will likely respect your professionalism for the caution you display.

New Challenges

Professional Indemnity Insurers tend to be conservative when evaluating new paradigms of practice or productivity tools.

They tend to be apprehensive of the unknown exposures and potential liabilities of significant changes in the mechanics of practice. The integration of electronic practice into the business context of architecture - from CAD to email to project - specific Web sites – presents new challenges to the architectural profession and raises new concerns for the profession's legal and insurance advisors.

An Insurer's View of the Risks of Cyber-Practice Communications Email Using the Internet for research and communications is becoming a basic part of every architecture firm's operations.

Using the Internet can be valuable and productive.

Despite benefits, however, the improper use of electronic research, and the dangers presented by the ease and casual attributes of electronic communications, may not only deprive firms of productive time but can also subject them to potentially significant liability.

This article explores the exposures email use creates.

Major Risks

There are two major risks in the rapid communication system known as "email." The first is that email is easy to generate and distribute. It is usually done so without the careful thought of prudent editing that characterises most written correspondence. Thus, comments and attachments can be distributed – and redistributed without the sensible review that should precede any professional communication. The second is that email often is not properly preserved. Professional liability insurers favour the retention of carefully crafted correspondence in cautiously constructed files. In many cases, email is not preserved.

In others, what an email sender thinks has been deleted simply lies hidden in electronic form to be brought out after a problem is identified by a forensic technologist who systematically pursues information in concealed electronic records.

Case law (American) has held employers liable for employee misuse of email and Internet access in situations ranging from sexual harassment to trademark and copyright infringement. Casual email messages may constitute defamation; the transmission of gossip and attempts at humour may be judged to create hostile work environment. The downloading and distribution of material from the Internet could not only subject the practice to intellectual property disputes but could also generate employment practices liability claims. In addition, because of employer responsibility for the acts of employees, even employee statements in Internet chat rooms could be deemed to be employer authorised. These statements may subject the employer to claims involving contractual obligations, defamation, invasion of privacy, and infliction of emotional distress.

Set Company Policies

Many professional service firms have created Internet and email - use policies. Many circulate such policies and include them in employee handbooks.

Others have taken the extra step of programming reminders that flash on computer log-on screens.
Firms without such policies should consider the following employee advisory suggestions in developing their Internet and email policies:

- Transmissions are not private. (Courts have ruled that email is an inherently public means of communication in which users lack any reasonable expectation of privacy.)
- Use may (or will) be subject to monitoring. (Although international interception of electronic communications is a felony, the monitoring of employee's electronic messages has been held not to violate the federal statue because that law does not prohibit the mere retrieval of messages stored on a compute system.)
- Only company-related use is authorised; any personal use, or any use for illegal or unethical purposes, is prohibited.
- Unauthorised Internet or email use can lead to disciplinary measures.

With the availability of project specific Web sites, email-based project documentation systems, and Internet research capabilities, the use of electronic exploration and the interchange of electronic information will continue to accelerate. Firms that do not address the management problems inherent in such systems may find increased risk from many sources. Successful firms will create policies that help employees take advantage of electronic communication to enhance productivity and increase firm profitability without generating needless liabilities.

Code Compliance Certificates Building Act 2004

Hamish Wixon, ***NZACS*** Director from Dunedin, has some wise words of advice on Code Compliance Certificates under the new Building Act. These have been very much in the news recently as difficulties the legislation imposes is brought to public attention. It is important therefore that members keep alert as to whether any changes are made to the Act and just how their Local Authority (now Building Consent Authority) is currently managing the issuing of Code Compliance Certificates.

Hamish writes:

There has been a lot of discussion and concern over the introduction of new provisions around building consent and inspection, particularly the issue of Code Compliance Certificates.

The new building consent and inspection provisions come into force on 31st March 2005.

- Building projects granted a building consent before 31st March 2005 will be completed under the provisions of the Building Act 1991, with one important exception.
- Code Compliance Certificates (CCC's) for these projects will be assessed against the provisions of the Building Consent, not against the Building Code at the time the Code Compliance Certificate is applied for.
- In the first instance the Building Consent Authority that issued the building consent must issue the CCC, however, another BCA can issue the CCC, if there is agreement between it and the building owner.
- Applications for CCC's are compulsory, and must be considered within 20 working days. If an application is not received, a BCA has two years from the date of consent to decide whether to issue a CCC.

IT IS AN OFFENCE TO PERMIT PUBLIC USE OF A BUILDING FOR WHICH NO CCC HAS BEEN GRANTED.

This last provision has consequences for architects observing building contracts. Architects will need to be more proactive at facilitating the inspection procedure to enable timely receipt of CCC's for public buildings. Discussion with BCA's has highlighted the need to ask BCA's to undertake earlier inspection of works to identify risk areas for the issue of CCC's.

Architects will need to be aware of the risks involved where there are separate shell and fit out contracts in place. If you are involved on a fit out contract there may be issues arising from the shell contract which may affect CCC for the fit out contract. For instance, the commissioning of a valve house for the sprinkler system. Co-ordination will be required between the contracts.

There is now no interim CCC's after 31st March 2005. This could be an issue when for instance there is a delayed delivery of lift components and the lift is not required for public use. At the present time (at the discretion of the BCA) an interim CCC could be issued which would enable public use of the building. There will also be a problem where previously a single consent has been applied for a multi unit staged development.

It will be important for architects to inform their clients about new risks under the new Building Act and to highlight the difference between the Practical Completion Certificates and Code Compliance Certificates. Clients will need to be aware who is responsible for applying for CCC and the time frame required for receipt of the CCC.

It will also be important for Architects to liaise with BCA's as requirements may vary from one area to another area. **The new Building Act allows hefty fines for non-compliance.**

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We welcome contributions from readers,
on how they manage risk.